

**Comments from the Legal Aid Community
to the United States Department of Education re:**

**Notice of Intention to Establish a Negotiated Rulemaking
Committee to Prepare Proposed Regulations on Title IV Federal
Student Aid Programs and Requirements Relating to Participating
Educational Programs (83 Fed. Reg. 36,814)**

Docket ID ED-2018-OPE-0076

September 14, 2018

Comments submitted on behalf of:

Community Legal Services of Philadelphia

Empire Justice Center

Housing and Economic Rights Advocates

Legal Aid Foundation of Los Angeles

Mobilization for Justice, Inc.

National Consumer Law Center (on behalf of its low-income clients)

North Carolina Justice Center

Project on Predatory Student Lending of the Legal Services Center of Harvard Law School

Public Law Center

I. Introduction

These comments, submitted on behalf of organizations that provide free legal assistance to low-income student loan borrowers, address the Department of Education's recent notice of its intent to create a negotiated rulemaking committee to revise a large number of regulations designed to protect students' and taxpayers' investments in higher education through the federal student aid system.¹ In these comments, we stress the importance of existing regulations that protect students and taxpayers from being preyed upon for federal student aid dollars, and emphasize that now is not the time to weaken oversight or institutional accountability. We also identify several topics that are not suitable for rulemaking at this time in light of recent and ongoing regulatory action, and we reiterate specific recommendations regarding state authorization based upon our prior work in this area. Finally, we urge the Department to reconsider the scope of topics to be discussed by the proposed committee because the tremendous breadth of issues proposed cannot reasonably be addressed through a single rulemaking process.

Our organizations strive to meet the legal needs of individuals and families with limited economic means, who otherwise would be without professional legal assistance. Our clients overlap with the populations that have most often suffered as a result of unscrupulous conduct in the higher education marketplace. They are often the first in their families to pursue higher education. They include people of color, immigrants, veterans, and older students—many of whom are parents. The issues to be addressed in the proposed rulemaking are of critical importance to the people we serve, as well as to hundreds of thousands of similarly-situated low-income students and borrowers.

We share the Department's interest in making affordable, high-quality, and innovative postsecondary education accessible to all Americans. However, we believe that access, affordability, quality, and innovation are strengthened by effective consumer protection, accountability, and oversight, not weakened by it as suggested by Department officials.² Furthermore, because we regularly work with low-income student loan borrowers who have been left far worse off after taking on unaffordable debt to attend schools more concerned with aggressive growth and profit maximization than student outcomes, we are acutely aware of the very real risks and costs to students of providing schools with easy access to federal student loan revenues without robust accountability and oversight. We therefore urge the Department to consider these risks to the low-income students who are most in need of the benefits of quality higher education if regulations are loosened in the name of encouraging innovation.

II. Effective Oversight Protects Students and Taxpayers.

We urge the Department to recognize the importance of existing regulations in securing fairness and value for students and taxpayers, and preventing abuse in the higher education marketplace. Each year, the federal government invests over \$150 billion in student loans, scholarships, and

¹ Negotiated Rulemaking Committee; Public Hearings, 83 Fed. Reg. 36,814 (July 31, 2018).

² See Kreighbaum, Andrew, *DeVos to Announce New Push for Deregulation, Innovation*, Inside Higher Ed (July 30, 2018), available at <http://www.insidehighered.com/news/2018/07/30/trump-administration-official-describes-plan-rethink-higher-education-through>.

tax credits in higher and career education.³ The regulations that the Department aims to charge this committee with reconsidering were largely designed to ensure that these taxpayer and student dollars are spent effectively. In doing so, they provide critical checks on the types of abusive and wasteful school practices that can leave former students mired in unaffordable student loan debt taken on for programs that do not provide adequate—or often any—return on investment. As detailed in recent legal aid community comments to the Department, our low-income clients who sought higher education and career training to secure a better future for themselves and their families are devastated and pushed deeper into poverty when schools take advantage of their dreams and loan eligibility and fail to deliver value.⁴ If the regulations identified in the Department’s notice are weakened or rescinded, these problems will only become more rampant.

The Department must do more to protect students, not less. Unfortunately, over the past two years the Department has pursued steps that have reduced oversight and protections for students.⁵ These efforts have included weakening access to loan relief for students defrauded by their educational institutions, proposing to eliminate protections designed to ensure that graduates of career college programs are gainfully employed upon completion, and delaying the aforementioned state authorization regulations. In each instance, the Department has hastily sought to upend important regulations that have addressed historical abuses that plague the higher education marketplace. The existing regulatory regime neither can be nor should be carelessly thrown aside in deregulatory zeal.

III. Revising Rules Prematurely Leaves Students At Risk.

Several of the issues enumerated by the Department for consideration during the proposed negotiated rulemaking committee are particularly ill-suited for immediate review. These include the regulations relating to state authorization, the definition of the federal credit-hour, and the relationship between an educational institution and another organization that provides a portion of the school’s programming.

Earlier this year, the Department delayed the implementation of new regulations—originally promulgated in 2016—pertaining to state authorization of distance education programs, including, but not limited to, mandatory disclosures about such programs to enrolled and prospective students.⁶ These regulations were the product of a 2014 negotiated rulemaking session that sought to adapt the Department’s regulation of distance learning to the explosively

³ Stuart Shepard and James D. Agresti, *Government Spending on Higher Education Reaches an All-Time High*, Just Facts (February 12, 2018), available at <https://www.justfactsdaily.com/government-spending-higher-education-all-time-high/>.

⁴ Comments from the Legal Aid Community to the Department of Education re: Proposed Regulations on Program Integrity: Gainful Employment Integrity: Gainful Employment, Docket ID ED-2018-OPE-0042 (September 13, 2018); Comments from the Legal Aid Community to the Department of Education re: Proposed Regulations on Borrower Defense, Docket ID ED-2018-OPE-0027 (August 30, 2018), available at https://www.nclc.org/images/pdf/student_loans/comms-proposed-rule-arb-closed-sch-false-cert.pdf; see also National Consumer Law Center, *Voices Of Despair: Student Borrowers Trapped in Poverty When the Government Seizes Their Earned Income Tax Credit* (Mar. 2018), available at <http://bit.ly/2Gstfq2>.

⁵ See e.g., Alex Schroeder, *How Betsy DeVos Is Reshaping Federal Education Policy*, WBUR (July 30, 2018), available at <http://www.wbur.org/onpoint/2018/07/30/betsy-devos-deregulation-for-profit-school-choice>.

⁶ Program Integrity and Improvement, 83 Fed. Reg. 31,296 (July 3, 2018).

growing online education sector. While the Department has claimed that more time is necessary to conduct an additional negotiated rulemaking session and revise the regulation, it has provided no substantive evidence concerning the inadequacy of these prior efforts.⁷ Our organizations invested significant time and resources into the previous negotiated rulemaking process with the understanding that the rulemaking was being undertaken in good faith and that the resulting rule would be implemented as stated. There is no justification for redoing this extensive process so soon, particularly given that there has been no change in the underlying factual circumstances. Rather than conduct additional rulemaking, it is appropriate to put these pre-existing regulations, which are the result of an extensive public process, in place.

Similarly, the current definition of the credit hour was finalized in 2011 and, as recently as 2015, the Department further streamlined the requirements for converting clock hours to credit hours.⁸ The Department has provided no evidence that these recent efforts have precluded access to quality innovative education, and thus should not bring together a new negotiated rulemaking committee to once again review regulations that have been so recently modified on this basis.

Moreover, the credit hour definition was originally adopted to strengthen the inconsistent and lax oversight of accrediting agencies as a metric to quantify student learning.⁹ It reduces the risk to low-income student borrowers of programs quickly and unjustifiably running up their loan balances and running down their lifetime Pell and subsidized loan eligibility without providing commensurate education. These regulations should be enforced unless and until the Department comes forward with an alternative method to put guardrails on schools' ability to charge student loan borrowers and taxpayers more money for less education.

Revisions to the regulations governing arrangements between an institution and another institution or organization to provide a portion of an educational program are also inappropriately timed. The Department is currently in the process of executing a pilot program—the EQUIP program—on this topic. The program, begun in 2016 and only recently expanded, has not yet progressed sufficiently to assess possible changes to the current regulatory regime.¹⁰

More generally, on these and the remainder of the topics suggested for the proposed negotiated rulemaking, we are concerned that, in support of fostering innovative postsecondary education, the Department may seek to undo much of the progress taxpayers and students have made over the last few years to rein in abusive practices. New teaching methods and technologies can benefit Americans but, based upon our work, we are acutely aware of the multitude of ways in which predatory practices have harmed students and taxpayers. Effective oversight and clear

⁷ *Id.*

⁸ Program Integrity and Improvement, 75 Fed. Reg. 66,832 (October 29, 2010); Program Integrity and Improvement, 80 Fed. Reg. 67,126 (October 30, 2015).

⁹ See U.S. Dep't of Educ., Office of Postsecondary Education Dear Colleague Letter GEN-11-06 (Mar. 18, 2011), available at <https://ifap.ed.gov/dpccletters/attachments/GEN1106.pdf>.

¹⁰ See Press Release, U.S. Dep't of Education, Expanding Pathways to Success After High School, U.S. Department of Education Approves First Innovative EQUIP Experiment (April 13, 2018), available at <https://www.ed.gov/news/press-releases/expanding-pathways-success-after-high-school-us-department-education-approves-first-innovative-equip-experiment>; see also Press Release, U.S. Dep't of Education, ED Launches Initiative for Low-Income Students to Access New Generation Of Higher Education Providers (April 16, 2016), available at <https://www.ed.gov/news/press-releases/fact-sheet-ed-launches-initiative-low-income-students-access-new-generation-higher-education-providers>.

rules are thus essential to ensuring that educational offerings funded by taxpayer dollars actually benefit students and do not create new opportunities for abuse.

IV. State Authorization Rules Should Not Be Weakened.

Notwithstanding the concerns cited above, if the Department does convene the proposed negotiated rulemaking committee and ask it to address state authorization for distance education, we reiterate and incorporate by reference the positions expressed in our previous comments on the topic.¹¹

Our low-income clients have been increasingly targeted by unscrupulous and predatory out-of-state schools that offer distance education programs. We believe that state authorization regulations, such as the 2016 regulations, are critically important to ensuring that these low-income students receive the same legal protections as students attending traditional brick-and-mortar schools in the same state. To protect students and taxpayers from exploitative distance education, all providers that wish to participate in the Title IV program must be required to obtain state authorization in each state where they enroll students and where the state requires authorization to operate. This ensures that states have the opportunity to conduct a review of distance education providers just as they do for traditional providers.

Additionally, federal regulations must define and set parameters around the use of state authorization agreements, which nearly all states now use as part of their framework for overseeing distance education. In order to protect students and state interests, these agreements must be consistent with the enforcement of state consumer protection laws.

Finally, schools that offer distance education should disclose basic but critical information about the quality and value of their programs, such as adverse actions taken by state agencies and accreditors. Relatedly, in light of the devastating problem of students wasting their time and money to attend online job-specific programs, such as nursing or teaching, without realizing or being told that the programs will not actually qualify them for licensure in that occupation in their state, career programs should be required to meet programmatic accreditation requirements necessary for students to attain professional licenses in their home states.

V. The Overly Broad Scope of the Proposed Rulemaking Will Not Allow for Meaningful Public Input.

It is readily apparent that a single rulemaking committee and process will be unable to appropriately address each of the issues outlined in the Department's notice, as published in the

¹¹ Comments from the Legal Aid Community to the Department of Education re: Proposed Regulations on Program Integrity and Improvement: State Authorization of Distance Education Programs, Docket ID ED-2016-OPE-0050 (August 24, 2016), available at <https://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/legal-aid-comments-state-auth.pdf>; National Consumer Law Center Comments on Proposed Delay of Program Integrity and Improvement, State Authorization of Distance Education Regulations, Docket ID No. ED-2018-OPE-0041 (June 11, 2018), available at https://www.nclc.org/images/pdf/student_loans/comments-opposing-state-authorization-rule-delay.pdf.

Federal Register on July 31, 2018.¹² Therefore, to the extent the Department does move forward with a new rulemaking process, we urge it to narrow its scope.

The Higher Education Act (HEA) imposes heightened requirements for notice and comment procedures on rulemaking related to the federal student aid programs to ensure robust input from all relevant stakeholders.¹³ In particular, the HEA requires that the Secretary “shall obtain the advice of and recommendations from individuals and representatives of the groups involved in student financial assistance programs . . . , such as students, legal assistance organizations that represent students,” and “shall provide for a comprehensive discussion and exchange of information” and “take into account the information received through such mechanisms in the development of proposed regulations.”¹⁴

We do not believe the Department can meet these standards in its proposed rulemaking given the tremendous breadth and complexity of the topics it proposes to address. The Department’s proposal to address more than ten detailed and distinct topics—as well as a number of complex subtopics—through a single rulemaking process and negotiating committee would preclude any possibility for “comprehensive discussion and exchange of information,”¹⁵ much less thoughtful consideration, evidence-based analysis, or effective negotiation of these critical issues. We are particularly concerned that the breadth of the proposed rulemaking will preclude sufficient opportunities to hear the voices of student borrowers, and those charged with representing their interests, on each issue, as is specifically required for lawful rulemaking under the HEA.

VI. Conclusion

As organizations that work with and on behalf of low-income student borrowers who have been harmed by actions of schools seeking to take advantage of the federal student aid system, we urge the Department to consider the risks and costs to low-income students of weakening regulation of the aid system in the name of encouraging innovation. We are concerned that the Department has inaccurately diagnosed consumer protection and oversight as a barrier to higher education, rather than a necessary component. In our experience, access to affordable, high quality, and innovative educational programs is strengthened by effective consumer protection and oversight, not weakened by it.

Thank you for your consideration of these comments. We welcome any opportunities to work with the Department in preserving and strengthening protections for low-income student loan borrowers. If you have any questions about these comments, please contact Abby Shafroth (ashafroth@nclc.org).

¹² Negotiated Rulemaking Committee; Public Hearings, 83 Fed. Reg. 36,814 (July 31, 2018).

¹³ 20 U.S.C. § 1098a.

¹⁴ 20 U.S.C. § 1098a(a).

¹⁵ *Id.*